(13)

No. 91-1671

In The

Supreme Court of the United States

October Term, 1992

WILLIAM J. MERTENS, ALEX W. BANDROWSKI, JAMES E. CLARKE, and RUSSELL FRANZ,

Petitioners,

v.

HEWITT ASSOCIATES, an Illinois Partnership,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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06/23/90	District Court Hearing On Defendant Hewitt's Motion To Dismiss.
08/10/90	Entry Of both the District Court's Memorandum And Order Dismissing Complaint And Cross-Claim in Mertens, et al. v. Hewitt Associates, et al., No. C-89-4475 MHP (N.D.Cal., Aug. 9, 1990) and Final Judgment.
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01/15/92	Order Denying Petition For Rehearing in Mertens, et al. v. Hewitt Associates, et al., No. 90-16272 (9th Cir., Jan 15, 1992).

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WILLIAM J. MERTENS, ALEX W. BANDROWSKI, JAMES E. CLARKE and RUSSELL FRANZ, Plaintiffs, v. HEWITT ASSOCIATES, an Illinois Partnership; KAISER STEEL RETIREMENT PLAN; and PENSION BENEFIT GUARANTY CORPORATION, as statutory trustee of the Kaiser Steel Retirement Plan, Defendants.	No. C 89 4475 COMPLAINT FOR DECLARATORY, INJUNCTIVE AND MONETARY RELIEF UNDER ERISA (CLASS ACTION) (JURY TRIAL DEMANDED) [Filed 12/18/89]

I. JURISDICTION

1. This action for declaratory, injunctive and monetary relief is brought pursuant to § 502(a)(3) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(3), and the Declaratory Judgment Act, 28 U.S.C. § 2201. Plaintiffs also invoke the Court's pendent jurisdiction over their state law cause of action for professional negligence.

II. THE PARTIES

2. Plaintiff WILLIAM J. MERTENS resides in Concord, County of Contra Costa, State of California.

3. Plaintiff ALEX W. BANDROWSKI resides in Napa, County of Napa, State of California.

4. Plaintiff RUSSELL FRANZ resides in Upland, County of San Bernardino, State of California.

5. Plaintiffs, and each of them, are retired, former salaried employees of Kaiser Steel Corporation ("Kaiser"), a Delaware corporation. Each plaintiff is a "participant" (within the meaning of ERISA § 3(7), 29 U.S.C § 1002(7)) in the Kaiser Steel Retirement Plan ("PLAN"), a defined benefit pension plan established by Kaiser on or about 1977 which was terminated in October, 1986, by the PENSION BENEFIT GUARANTY CORPORATION ("PBGC") pursuant to the distress termination procedures of ERISA § 4041(c), 29 U.S.C. § 1341.

6. At all relevant times, defendant KAISER STEEL RETIREMENT PLAN ("PLAN") was a "defined benefit plan" within the meaning of ERISA § 3(35), 29 U.S.C.

§ 1002(35), and subject to the minimum funding standards imposed by ERISA § 302, 29 U.S.C. § 1082.

7. Upon information and belief, defendant HEWITT ASSOCIATES ("HEWITT") is a partnership established under the laws of the State of Illinois and doing business in the State of California. At all times relevant herein, HEWITT was an "enrolled actuary" within the meaning of ERISA § 3042, 29 U.S.C. § 1242, and regulations promulgated thereunder, and a "party-in-interest" as to the PLAN within the meaning of ERISA § 3(14), 29 U.S.C. § 1002(14).

8. Defendant PENSION BENEFIT GUARANTY CORPORATION ("PBGC") is a wholly-owned United States government corporation created by ERISA § 4002, 29 U.S.C. § 1302, to administer the pension plan termination insurance program established by Title IV of ERISA. PBGC is sued herein as a necessary party in its capacity as statutory trustee of the PLAN. Upon information and belief, there may arise a conflict between plaintiffs and defendant PBGC with respect to any monies recovered herein for the PLAN.

FACTS COMMON TO ALL CLAIMS

9. At all times relevant herein, HEWITT performed all actuarial work on behalf of the PLAN mandated by ERISA and regulations promulgated thereunder. Upon information and belief, Kaiser retained HEWITT on behalf of the PLAN and paid for its services.

10. Commencing in early 1980, Kaiser changed the basic nature of its business. The Company's radical

restructuring culminated in the curtailment and virtual elimination of its steel-making operations.

11. Among other effects, the change in the nature of Kaiser's business resulted in a substantial increase in the number of participants who retired from the Company with an entitlement to unreduced early retirement benefits under the terms of the PLAN.

12. The sharp increase in unreduced early retirements (and related events) imposed material increases in the PLAN's funding costs which were not reflected in the actuarial assumptions developed by HEWITT for the PLAN.

13. Nevertheless, throughout the period of the Company's radical transformation, HEWITT failed on an ongoing basis to change the actuarial assumptions so as to reflect the material increases in the PLAN's funding costs associated with the high number of early retirements.

14. Had HEWITT employed proper actuarial assumptions, then Kaiser would have been obligated to make substantially higher contributions in order to properly fund the PLAN.

15. Upon information and belief, HEWITT performed actuarial services for Kaiser at the same time that it performed services to the PLAN. Upon further information and belief, HEWITT's services to Kaiser related to its obligations to fund the PLAN.

16. Upon information and belief, at no time did HEWITT make full disclosure of its professional relationship with Kaiser, and any potential conflicts associated therewith, to the PLAN's fiduciaries or administrator.

17. Moreover, at no time did HEWITT disclose the material funding inadequacies and the implications thereof in any certificate or other writing which it was obligated to prepare on behalf of the PLAN.

18. As a consequence of HEWITT's acts and omissions, Kaiser failed to make the requisite contributions into the PLAN. The PLAN's assets became insufficient to satisfy its benefit commitments, including the commitments to pay plaintiffs and members of their class their fully vested pensions.

19. In October, 1986, the PBGC determined the PLAN to be severely underfunded and incapable of paying its liabilities, including the full early retirement monthly pension benefits owed to plaintiffs and other similarly situated PLAN participants and beneficiaries. Accordingly, pursuant to the distress termination procedures of ERISA § 4041(c), 29 U.S.C. § 1341, the PBGC terminated the PLAN and began paying plaintiffs and other PLAN participants and beneficiaries substantially reduced monthly pension benefits.

20. Upon termination of the PLAN, the PBGC became the statutory trustee of the PLAN pursuant to ERISA § 4042, 29 U.S.C. § 1342.

21. Before PBGC terminated the PLAN, plaintiff WILLIAM J. MERTENS received a monthly pension benefit in the amount of $2,016.00. Now, he receives only a

$521.00 monthly pension benefit. Before the PLAN was terminated, plaintiff ALEX W. BANDROWSKI received $1,907.00 monthly, but now receives only $670.00 as a monthly pension. Plaintiff JAMES E. CLARKE previously received $2,567.00 monthly, but now receives only $1,103.00 as a monthly pension. Plaintiff RUSSELL FRANZ previously received $1,426.00 monthly, but now receives only $478.00 as a monthly pension.

22. As a result of the underfunding of the PLAN and its termination, plaintiffs and other similarly situated PLAN participants and beneficiaries all now receive substantially less than their entitlements to full early retirement pension benefits.

23. Information regarding the repeated meetings and other occasions when HEWITT's actuaries, employees and agents exercised defendant's fiduciary duties regarding the Kaiser Steel Retirement Plan, or could and should have exercised those duties, is particularly within the knowledge of HEWITT.

24. The acts, omissions and breaches of professional obligations to the PLAN as alleged herein include the ongoing failure of HEWITT to exercise due care, skill, prudence and diligence in employing actuarial methods and assumptions appropriate to the conditions created by the restructuring of Kaiser.

III. CLASS ACTION ALLEGATIONS

25. Plaintiffs bring this action on behalf of themselves and as a class action under the provisions of Rule

23 of the Federal Rules of Civil Procedure on behalf of all members of the class, defined as follows:

> All persons, other than defendants in *Mertens, et al. v. Kaiser Steel Retirement Plan, et al.*, Civil No. C-88-3587-MHP, who are, or have been, participants in or beneficiaries of the PLAN, and whose PLAN benefits were eliminated or reduced as a consequence of the acts and omissions alleged herein.

26. The requirements for maintaining this action as a class action under F.R.Civ.P. 23(a), (b)(1) and (b)(2), are satisfied in that:

(a) There are numerous class members who are participants or beneficiaries of the PLAN. Their exact number and identities are currently unknown to plaintiffs; but, upon information and belief, approximately 175 participants and beneficiaries constitute the class.

(b) The members of the class are so numerous that joinder of all members is impracticable.

(c) There are questions of law and fact common to the class, which questions relate to the existence and scope of defendants' duties, actions, and omissions herein alleged.

(d) Plaintiffs are members of said class; their claims are typical of the claims of the class members and they will fairly and adequately protect the interests of the class. The interests of plaintiffs are coincident with, and not adverse to, those of the remainder of the class. Plaintiffs are represented by attorneys who have specialized in ERISA litigation.

(e) The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications establishing incompatible standards of conduct for HEWITT and a risk of adjudications which, as a practical matter, would be dispositive of the interests of other members who are not parties.

(f) HEWITT has acted, and refused to act, on grounds generally applicable to the class, thereby making appropriate final injunctive and other equitable relief with respect to the class as a whole.

FIRST ERISA CAUSE OF ACTION

[Breach Of Professional Duties to PLAN]

27. Plaintiffs incorporate Paragraphs 1 through 26 as though fully set forth herein.

28. As the PLAN's actuary, HEWITT was subject to the requirements imposed by ERISA, including:

A. ERISA § 302(c)(3), 29 U.S.C. § 1082(c)(3), which provides:

> For purposes of this part, all costs, liabilities, rates of interest, and other factors under the plan shall be determined on the basis of actuarial assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan.

B. ERISA § 103(a)(4)(B), 29 U.S.C. § 1023(a)(4)(B), which provides:

The enrolled actuary shall utilize such assumptions and techniques as are necessary to enable him to form an opinion as to whether the contents of the matters reported under subsection (d) of this section –

(i) are in the aggregate reasonably related to the experience of the plan and to reasonable expectations; and

(ii) represent his best estimate of anticipated experience under the plan.

The opinion by the enrolled actuary shall be made with respect to, and shall be made a part of, each annual report.

C. ERISA § 103(d), 29 U.S.C. § 1023, which required, in relevant part:

(8) A statement by the enrolled actuary –

(A) that to the best of his knowledge the [actuarial] report is complete and accurate, and

(B) the requirements of section 302(c)(3) (relating to reasonable actuarial assumptions and methods) have been complied with.

* * *

(10) A statement by the enrolled actuary which discloses:

(A) any event which the actuary has not taken into account, and

(B) any trend which, for purposes of the actuarial assumptions used, was not assumed to continue in the future, but only

if, to the best of the actuary's knowledge, such event or trend may require a material increase in plan costs or required contribution rates.

* * *

(13) Such other information as may be necessary to fully and fairly disclose the actuarial position of the plan.

29. In addition to the foregoing statutory requirements, HEWITT was at all times under an affirmative duty to adhere to regulations defining standards of performance of actuarial services as promulgated by the Joint Board for the Enrollment of Actuaries (JBEA), pursuant to its authority under ERISA § 3042, 29 U.S.C. § 1242.

30. The applicable JBEA regulations imposed *specific* standards of professional conduct on HEWITT, including:

(b) Professional duty. An enrolled actuary shall not perform actuarial services for any person or organization which he/she believes or has reasonable grounds for believing may utilize his/her services in a fraudulent manner or in a manner inconsistent with law.

* * *

(d) Conflicts of interest. In any situation in which the enrolled actuary has a conflict of interest with respect to the performance of actuarial services, of which the enrolled actuary has knowledge, he/she shall not perform such actuarial services except after full disclosure has been made to plan trustees, any named fiduciary of the plan, the plan administrator, and, if the plan is subject to a collective bargaining

agreement, the collective bargaining representative.

(e) Assumptions, calculations and recommendations. The enrolled actuary shall exercise due care, skill, prudence and diligence to ensure that:

(1) The actuarial assumptions are reasonable in the aggregate and the actuarial cost method and the actuarial method of valuation of assets is appropriate.

(2) The calculations are accurately carried out, and

(3) The report, any recommendations to the plan administrator and any supplemental advice or explanation relative to the report reflect the results of the calculations.

(f) Report or certificate. An enrolled actuary shall include in any report or certificate stating actuarial costs or liabilities, a statement or reference describing or clearly identifying the data, any material inadequacies therein and the implications thereof, and the actuarial methods and assumptions employed.

(ERISA Regs. § 901.20, 42 FR 39204.)

31. In addition, under IRS REG. § 1.412(c)(1)-1, HEWITT had a duty to the PLAN to choose actuarial assumptions appropriate to the funding method selected by Kaiser. HEWITT had no legal right to delegate that responsibility to Kaiser or to allow Kaiser to select or impose actuarial assumptions of its own choosing.

32. Nevertheless, upon information and belief, HEWITT either delegated the responsibility to Kaiser for

selecting the PLAN's actuarial assumptions or allowed Kaiser to impose its choice of assumptions. Upon further information and belief, HEWITT did so in order not to jeopardize its lucrative professional relationship with Kaiser.

33. By the acts and omissions described herein, HEWITT breached each of the foregoing ERISA provisions and applicable regulations relating to its professional obligations to the PLAN.

34. As a direct and proximate result, the PLAN became severely underfunded with the consequence that plaintiffs and their class have lost their fully earned vested retirement benefits.

35. Upon information and belief, HEWITT failed to employ proper actuarial assumptions so as to allow Kaiser to avoid paying higher contributions into the PLAN and in order to pursue its lucrative business relationship with Kaiser. Therefore, in committing the acts and omissions set forth herein, HEWITT acted intentionally, maliciously and/or with wanton indifference to the integrity of the PLAN and the rights of plaintiffs and their class, thereby justifying an award of punitive damages.

SECOND ERISA CAUSE OF ACTION

[Unlawful Party-In-Interest Transactions]

36. Plaintiffs incorporate paragraphs 1 through 26 and 28 through 35 as though fully set forth herein.

37. ERISA § 406(a)(1)(C), 29 U.S.C. § 1106(a)(1)(B), prohibits transactions involving a direct or indirect lending of money or other extension of credit between a plan and a party-in-interest.

38. ERISA § 406(a)(1)(C), 29 U.S.C. § 1106(a)(1)(C), prohibits transactions involving a direct or indirect furnishing of goods, services, or facilities between a plan and a party-in-interest.

39. ERISA § 408(b), 29 U.S.C. § 1108(b), exempts service providers to ERISA plans from the prohibitions of Section 406 " . . . if no more than reasonable compensation is paid . . . " for the services.

40. Because it breached its obligations, duties and responsibilities to the PLAN, failed to exercise due care, skill, prudence and diligence in the performance of its duties, and provided services to Kaiser in conflict to its obligations to the PLAN, HEWITT's compensation was not reasonable. Accordingly, by receiving compensation for the services it provided PLAN, HEWITT committed a prohibited transaction in violation of ERISA § 408.

PRAYER FOR RELIEF UNDER ERISA

WHEREFORE, on the First and Second Causes of Action, plaintiffs, pursuant to ERISA § 502(a)(3), pray that the Court:

A. Grant declaratory relief to the effect that HEWITT breached the duties, obligations and responsibilities imposed on it by ERISA and JBEA Regulations;

B. Declare that HEWITT failed to assure that the PLAN met the minimum funding standards imposed by ERISA § 302, 29 U.S.C. § 1082.

C. Grant judgment against HEWITT and order it to make good to the PLAN, plaintiffs and their class any and all losses to the PLAN resulting from its breaches of ERISA;

D. Grant judgment for punitive damages;

E. Grant judgment for pre-judgment interest;

F. Appoint a fiduciary for the PLAN to receive all funds restored by HEWITT and to distribute and/or pay benefits out of such restored funds to plaintiffs and their class;

G. Declare the respective rights of plaintiffs and their class and the defendant PBGC to any funds restored to the PLAN;

H. Grant judgment for the costs of suit herein and plaintiffs' attorneys' fees, pursuant to ERISA § 502(g), 29 U.S.C. § 1132(g); and,

I. Grant such other and further legal and equitable relief as the Court deems appropriate.

THIRD CAUSE OF ACTION

(Professional Negligence Under California Law)

41. Plaintiffs incorporate Paragraphs 1 through 26 and 28 through 35 as though fully set forth herein.

42. During all relevant times, HEWITT has held itself out to the public and to the PLAN as a qualified enrolled actuary for ERISA-regulated employee benefit

plans, with the requisite degree of skill and knowledge necessary to assure that client-plans are maintained in compliance with all applicable law.

43. At all times relevant herein, HEWITT had an agreement whereby HEWITT, on a fee basis, agreed to perform and purported to perform all actuarial work on behalf of the PLAN mandated by ERISA and regulations promulgated thereunder.

44. By entering into the agreement described herein, HEWITT impliedly represented and warranted that in carrying out its responsibilities to the PLAN, it would use due care, skill, prudence and diligence. Said representation was made for the benefit of plaintiffs and their class in their capacities as the PLAN's participants and beneficiaries.

45. Nevertheless, HEWITT, in performing its actuarial services, failed to take into account the radical restructuring of Kaiser and related corporate events. Thus, HEWITT did not employ reasonable actuarial assumptions in the aggregate and, among other acts and omissions, failed to properly consider the impact on the PLAN's funding of the Company's radical restructuring.

46. Moreover, upon information and belief, HEWITT failed to advise the PLAN's fiduciaries of its employment by Kaiser and consequent conflict of interest regarding its services to the PLAN.

47. As a direct and proximate result of the HEWITT's professional malpractice as alleged herein, the PLAN became severely underfunded, thus preventing plaintiffs and other PLAN participants and beneficiaries

from receiving their fully earned vested retirement pension benefits.

48. In committing the acts and omissions set forth herein, HEWITT acted intentionally, maliciously and/or with wanton indifference to the rights of plaintiffs and other PLAN participants and beneficiaries, thereby justifying an award of punitive damages.

PRAYER FOR RELIEF REGARDING PENDENT STATE LAW CLAIM

WHEREFORE, plaintiffs prays:

A. For all damages according to proof;

B. For costs of suit incurred herein;

C. For punitive damages according to proof;

D. For such other and further relief as may be deemed just and proper.

Dated: December 18, 1989

Respectfully submitted,

SIGMAN & LEWIS

ANDREW THOMAS SINCLAIR

By: ______________________

Stephen Bingham

DEMAND FOR A JURY TRIAL

Plaintiffs hereby demand a jury trial as provided for in F.R.Civ.P. 38.

Dated: December 18, 1989

Respectfully submitted,

SIGMAN & LEWIS

ANDREW THOMAS SINCLAIR

By: ____________________

Stephen Bingham

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

WILLIAM J. MERTENS, ALEX W. BANDROWSKI, JAMES E. CLARKE and RUSSELL FRANZ,

Plaintiffs,

v.

HEWITT ASSOCIATES, an Illinois Partnership; KAISER STEEL RETIREMENT PLAN; and PENSION BENEFIT GUARANTY CORPORATION, as statutory trustee of the Kaiser Steel Retirement Plan,

Defendants.

No. C-89-4475-MHP

MEMORANDUM AND ORDER

Plaintiffs bring this action for declaratory, injunctive and monetary relief under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, et seq. and include a pendent state claim. The parties are now before the court on defendant Hewitt's motions [*sic*] dismiss the complaint and to dismiss a cross-claim under Federal Rule of Civil Procedure 12(b)(6).

BACKGROUND

Plaintiffs, former salaried employees of the Kaiser Steel Corporation, filed this action on December 18, 1989, alleging that Hewitt Associates ("Hewitt") had violated certain provisions of ERISA and California law while acting as actuary for the Kaiser Steel Retirement Plan

("Plan"). The court assumes the following allegations to be true, as it must for purposes of Hewitt's motion to dismiss.

Beginning in 1980, Kaiser radically restructured its business, ultimately curtailing and virtually eliminating its steel-making operations. Cplt. at 10. As a consequence of that curtailment, the number of employees who took early retirement, and were thus eligible for early retirement benefits, rose sharply. The early retirements, and related events resulted in significantly higher funding costs for the Plan which were not reflected in the actuarial assumptions employed by Hewitt.

Hewitt acted as actuary for the Plan from the Plan's inception in 1977 until the Plan was terminated in 1986. *Id.* at 3. Because of Hewitt's failure to alter its actuarial assumptions, Kaiser made substantially lower payments than necessary into the Plan. *Id.* at 4. Hewitt never disclosed those funding inadequacies in ERISA-prescribed documents or otherwise. *Id.* Hewitt also never disclosed that it was performing actuarial services for Kaiser at the same time as it performed those services for the Plan. *Id.*

In October 1986, the Pension Benefit Guaranty Corporation ("PBGC"), a government corporation created under ERISA to administer the pension plan termination program, terminated the Plan after determining that the Plan was severely under-funded and incapable of paying its liabilities. *Id.* at 4-5. The PBGC is now the statutory trustee of the Plan. The retirement benefits of each of the plaintiffs and those similarly situated are considerably less under PBGC administration than those benefits to

which they were entitled before the Plan was terminated. *Id.* at 5.

The termination of the Plan has resulted in several lawsuits by Plan members, three of which have been instituted before this Court. In the present action, plaintiffs allege that Hewitt's actions were a breach of "professional duties" to the Plan created by ERISA, related regulations, and IRS regulations; that they constituted party-in-interest transactions in violation of ERISA section 406(a)(1), codified at 29 U.S.C. section 1106(a)(1); and that they constituted common law negligence. The PBGC and the Plan were named as defendants along with Hewitt.

Defendant Hewitt now enters motions for dismissal of the complaint and of the cross-claim of the PBGC.[1]

LEGAL STANDARD

A motion to dismiss will be denied unless it appears that the plaintiff can prove no set of facts which would entitle him or her to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Fidelity Financial Corp. v. Federal Home Loan Bank of San Francisco*, 792 F.2d 1432, 1435 (9th Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987). All material allegations in the complaint will be taken as true and construed in the light most favorable to the plaintiff. *NL Industries, Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). Although the court is generally confined to consideration of the allegations in the pleadings, when the complaint is accompanied by attached documents, such documents are deemed part of the complaint and may be considered in evaluating the merits of a Rule 12(b)(6) motion. *Durning*

v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir.), *cert. denied sub. nom. Wyoming Community Dev. Auth. v. Durning*, ___ U.S. ___, 108 S.Ct. 330 (1987).

DISCUSSION

Hewitt's motion to dismiss is based on several grounds. Defendant contends that the first and second counts of plaintiffs' complaint fail to state a claim upon which relief can be granted under ERISA. For count one, Hewitt maintains that no private right of action exists under ERISA for a so-called "breach of professional duties." For count two, Hewitt argues that plaintiffs have not properly alleged an unlawful party-in-interest transaction. Finally, Hewitt argues that the statute of limitations bars all claims. The court will take up each of these contentions in turn.[2]

I. The Viability of the ERISA Claim for Breach of Fiduciary Duty

The complaint includes no explicit count for breach of fiduciary duty, but the plaintiffs ask the court to read such a claim into it. They argue that count one can be construed as stating a valid claim for breach of fiduciary duty against Hewitt. Such a claim can only survive if Hewitt, the Plan actuary, is deemed a plan fiduciary. For present purposes, a plan fiduciary is one who:

> exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . [or one who] has any discretionary

> authority or discretionary responsibility in the administration of such plan.

(29 U.S.C. § 1002(21)(A).)

Absent a showing that they have moved beyond the realm of their ordinary duties, actuaries, attorneys and accountants are not plan fiduciaries. *Yeseta v. Baima*, 837 F.2d 380, 385 & n. 2 (9th Cir. 1988) (finding attorney and accountant not to be fiduciaries where they exercised purely ministerial duties); 29 C.F.R. § 2509.75-5 (1986) (actuary not fiduciary unless exercised control over management of plan or plan's assets).

Plaintiffs argue that if Hewitt controlled or had the authority to control the setting of actuarial assumptions, then Hewitt was a fiduciary. They maintain that the complaint's allegations that Hewitt was responsible for employing and changing actuarial assumptions are sufficient to make Hewitt a fiduciary. That argument must fail. Actuaries are statutorily bound to employ actuarial assumptions in preparing statements for benefit plan annual reports. 29 U.S.C. § 1023(d)(8). Moreover, actuaries must re-evaluate and possibly change assumptions on at least an annual basis, since their written statements are required yearly. The performance of these statutorily-prescribed duties does not render actuaries fiduciaries.

Plaintiffs cite no cases finding an actuary to be a fiduciary. The authority that they do cite is either too general or simply inapposite. In *Eaton v. D'Amato*, 581 F. Supp. 743 (D.D.C. 1980), the defendant found to be a fiduciary was a company which administered employee benefit plans. The court found that the company provided a range of administrative and management services

to the benefit plans at issue, including adjudicating medical claims, supervising a dental clinic and supervising the establishment of recordkeeping systems. "In each instance [the company] apparently possessed broad latitude in making awards, setting priorities, and performing other administrative tasks. . . . [The company] exercised far more than ministerial powers." *Id.* at 747. In the present case, by contrast, plaintiffs nowhere allege that Hewitt's role expanded beyond that of a typical actuary.[3] The other case plaintiffs principally rely upon for their argument that actuaries may be fiduciaries is also distinct from the present case. *Brock v. Self*, 632 F. Supp. 1509, 1520 (W.D. La. 1986) (pension plan servicing company, its executive officer and an employee all found to be fiduciaries because they rendered investment advice for a fee and exercised discretionary authority).

This court's decision that Hewitt's acts do not render it a fiduciary is supported by the few reported decisions directly on point. In *Associates in Adolescent Psychiatry v. Home Life Ins. Co.*, 729 F. Supp. 1162 (N.D. Ill. 1989), the court found that actuarial defendants who did nothing more than render professional services were not fiduciaries. Similarly, in the case at bar, taking all the complaint's allegations as true, Hewitt did nothing more than negligently perform actuarial services.[4] In *Pappas v. Buck*, 1989 U.S. Dist. LEXIS 14767, (N.D. Ill. Dec. 11, 1989), the defendant actuaries were accused of using the wrong yearly interest rate in computing their actuarial assumptions. The court stated:

> Defendants are accused only of giving faulty advice and professional services of a kind that do not involve exercising authority over the plan's assets. . . . We do not think that the rendering of professional actuarial advice alone can render one an ERISA fiduciary. *See, e.g.*, *Painters of Philadelphia Dist. Council v. Price Waterhouse*, 879 F.2d 1146, 1149-50 (3d Cir. 1989) [public accountant's audit of ERISA fund did not render accountant a fiduciary].

Id. at 6. The complaint in this case only alleges that Hewitt improperly performed its actuarial duties. The allegations taken as a whole do not render Hewitt an ERISA fiduciary.

II. Viability of Claim for Knowing Participation in Breach of Fiduciary Duty

Plaintiffs also maintain that count one can be construed as alleging that Hewitt knowingly participated in breaches of fiduciary duties by Plan fiduciaries. Plaintiffs concede that the Ninth Circuit has explicitly ruled that no right of action exists under ERISA for damages against a non-fiduciary. *Nieto v. Ecker*, 845 F.2d 868, 873 (9th Cir. 1988) (reaffirmed in *Call v. Sumitomo Bank*, 881 F.2d 626, 634 (9th Cir. 1989)). However, they argue that passage of the Omnibus Revenue Reconciliation Act in 1989 clarified Congress' intent to allow such actions. They contend that the amendments to ERISA codified at 29 U.S.C. section 1132(l), which require the Secretary of Labor to levy civil penalties against those who knowingly participate in breaches of fiduciary duty, demonstrate that Congress intended such individuals to be liable under 29 U.S.C. section 1109 all along.

This court will not engage in creative rewriting of the statute or of current Ninth Circuit law by which it remains bound. The Ninth Circuit has clearly rejected aider and abettor or other non-fiduciary liability under section 1109.

III. Viability of Claim for Breach of Actuarial Duties

Plaintiffs also allege in their first cause of action that Hewitt breached professional duties imposed upon it by ERISA statutes and regulations and by Internal Revenue Service regulations.[5]

Plaintiffs concede, as they must, that their only viable avenue for redress of ERISA violations committed by a non-fiduciary is through a claim for equitable relief under 29 U.S.C. section 1132(a)(3).[6] *Nieto*, 845 F.2d at 874. Plaintiffs' prayer for relief asks for an order that Hewitt "make good to the Plan, plaintiffs and their class any and all losses to the Plan resulting from its breaches of ERISA." Cplt. at 12. Plaintiffs classify this as a prayer for restitutionary relief.[7] Opp. Mem. at 23.

Few reported cases have considered the availability of restitutionary relief under section 1132(a)(3). The parties have cited none. In the only reported appellate case on point, *United States Steel Mining Co. v. District 17 United Mine Workers*, 897 F.2d 149 (4th Cir. 1990), a company and its pension fund sought to recover benefits wrongly paid to employees in compliance with a state court injunction which was later invalidated. The defendants were the state court judge, the employee union and its members. The Fourth Circuit ruled that it was inappropriate for a federal court to grant relief under the circumstances because: 1) the damages sought were extra-contractual, in contradiction of the dictates of *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985) and 2) the state court which issued the injunction was the best forum for relief. *United States Steel Mining Co.*, 897 F.2d at 153. In its denial of restitutionary relief for the case before it, the court rendered no opinion on the availability of such relief under section 1132(a)(3) in general.

Three district court cases have considered the issue before the court. In *Bartz v. Carter*, 709 F. Supp. 827 (N.D. Ill. 1989) the plaintiffs sought restitution from trustees who allegedly converted a profit sharing plan into an employee stock ownership plan and gained control of the company, resulting in a substantial reduction in the value of plan assets. The court denied a motion to dismiss the claim, ruling that it was properly brought under section 1132(a)(3)(B)(ii). Although this court disagrees and considers such a claim properly brought under section 1132(a)(2) instead, the *Bartz* decision still serves as an example of judicial recognition of the restitutionary remedy under section 1132.

Further recognition of the remedy occurred in *Rochetti v. American Fed'n. of Musicians' and Employers' Pension Welfare Fund*, 1987 W.L. 12767 (N.D. Ill. Aug. 13, 1987) and *Bittner v. Sadoff & Rudoy Indus.*, 490 F. Supp. 534, 536 (E.D. Wis. 1980). In *Rochetti* musicians sought to recover payments made on their behalf into a benefits fund. They alleged that the payments violated the Labor Management Relations Act. The court recognized that restitution was an equitable remedy contemplated by section 1132(a)(3), but denied it to the plaintiffs because they did not seek to redress violations of ERISA.

In *Bittner*, the plaintiff alleged that he had been dismissed in retaliation for exercising his right to ERISA benefits. He sought back pay and reinstatement. In denying the defendant's motion to dismiss, the court observed

that section 1132(a)(3) authorized equitable relief and stated, "[c]hief among the equitable remedies is the remedy of restitution." *Id.* at 536.

The above cases provide sufficient support for this court to grant restitutionary relief under section 1132(a)(3), in appropriate circumstances. However, the case at bar does not present such circumstances. Restitutionary relief must be predicated on some unjust enrichment. "[R]estitution is generally awarded when the defendant has gained a benefit that it would be unjust for him to keep. . . . " Dobbs *Remedies*, § 4.1 at 224 (West 1978). In the case at bar there are no allegations that Hewitt's purported violations have resulted in any benefit beyond its normal compensation as an actuary.

That is not to say that no protections are available against actuaries who violate ERISA without profiting from their malfeasance. Timely injunctive relief is available under sections 1132(a)(3) and (a)(5). Moreover, relief is also available through the Joint Board for Enrollment of Actuaries who may suspend or terminate an offending actuary's right to provide services to ERISA plans. 29 U.S.C. § 1242(b).

Because no claim exists on the alleged facts for breach of fiduciary duty, for knowing participation in breach of fiduciary duty, or for breach of "professional duties," the first cause of action in this case is dismissed.

IV. Viability of Claim for Unlawful Party-In-Interest Transactions

As a general rule, a claim under section 1132(a)(3) can be made for violations of the prohibited transaction sections of ERISA. *Nieto*, 845 F.2d at 873-74. Plaintiffs allege such a violation as follows in their second cause of action:

> Because it breached its obligations, duties and responsibilities to the PLAN, failed to exercise due care, skill, prudence and diligence in the performance of its duties, and provided services to Kaiser in conflict to its obligations to the PLAN, HEWITT's compensation was not reasonable. Accordingly, by receiving compensation for the services it provided PLAN, HEWITT committed a prohibited transaction in violation of ERISA § 408 [sic] [406 intended].

(Cplt. para. 40.)

Plaintiffs attempt to bootstrap a right to relief for commission of prohibited transactions based on a separate claim for violation of actuarial duties. The second cause of action is redundant. The violation of actuarial duties was alleged in count one. That violation cannot fairly be held to have rendered Hewitt's acceptance of otherwise reasonable compensation an additional actionable claim. Under the plaintiffs' scheme, any time a service provider was liable for an ERISA violation, both the provider and otherwise blameless plan fiduciaries would be liable for engaging in a prohibited transaction if the fiduciaries paid the negligent provider. Nothing in ERISA suggests such far-flung remedies.

Plaintiffs' reliance on *Nieto* is unavailing. The attorney defendant in *Nieto* allegedly was paid for services he never rendered, as opposed to being paid for services negligently rendered. *Id.* at 870. The excess compensation was thus the basis for a valid claim of engaging in a prohibited transaction.

The plaintiffs' prohibited transaction claim is flawed for an additional reason. A prohibited transaction requires wrongful receipt of plan assets. 29 U.S.C. § 1106. The complaint alleges that Hewitt was paid for its services by Kaiser Steel, not by the Plan. Cplt. at para. 9. Thus, there was no prohibited transaction between Hewitt and the Plan within the meaning of section 1106. Plaintiffs' attempt at oral argument to tie the Plan to the source of funds for Hewitt's payment was nothing more than conjecture. Plaintiffs have failed to state a claim under ERISA for count two of the complaint and the count is dismissed.

V. Viability of Pendent Professional Negligence Claim

Plaintiffs concede that their third cause of action for professional negligence under state law is governed by the two-year statute of limitations of California Code of Civil Procedure section 339.1. Therefore, only those wrongful acts occurring in the two years prior to the filing of the suit on December 18, 1989 are actionable, unless tolling applies.

Plaintiffs contend that the statute did not begin to run until after commencement of discovery in the related case of *Mertens v. Kaiser Steel Retirement Plan,* No.

C-88-3587-MHP (N.D. Cal), which was filed in September 1988. They maintain that until then there was no "notice or information of circumstances to put a reasonable person on inquiry," *Jolly v. Eli Lilly & Co.*, 44 Cal.3d 1103 (1988). They also cite other bases for tolling. *April Enterprises v. KTTV*, 147 Cal. App. 3d 805, 831 (1983) (statute tolled where the injury or the act causing injury has been difficult to discover); *Bedolla v. Logan & Frazer*, 52 Cal. App. 3d 118, 125 (1975) (statute tolled until wrongful acts are discovered or with reasonable diligence could have been discovered).

The defendant argues that the statute began running at the time when the PBGC terminated the Plan after determining that it was "severely underfunded and incapable of paying its liabilities." Cplt. para. 19. They maintain that, since the PBGC made a determination of underfunding and terminated the Plan in October 1986, the plaintiffs then knew or should have known of the Plan's funding inadequacies. They contend that, in any event, once plaintiffs began receiving reduced benefits checks they were on notice of the need to discover the facts underlying the Plan's termination.

The court agrees with defendant. The allegations in the complaint regarding the termination of the Plan in October 1986 due to underfunding establish that the statutory period commenced at that time. Since the action was not filed until December 1989, the negligence claim is barred.

CONCLUSION

For the foregoing reasons, the court GRANTS defendant Hewitt's motion for dismissal of the complaint in its

entirety. All federal claims in the complaint are DISMISSED for failure to state claims upon which relief may be granted. The statute of limitations has run on the pendent law state claim and it, too, is DISMISSED. The court also GRANTS defendant Hewitt's motion for dismissal of the PBGC's cross-claim. Since the cross-claim is derivative of the fatally defective complaint, the cross-claim is DISMISSED.

Although defendant Hewitt's motion was not brought on behalf of the other two defendants, since no distinct allegations were directed against them, the PBGC and the Plan are also DISMISSED from the action.

IT IS SO ORDERED.

Dated: August 9, 1990

/s/ ____________________
MARILYN HALL PATEL
United States District Judge

ENDNOTES

[1] In reference to the motion to dismiss the cross-claim of the PBGC, Hewitt argues, and the PBGC concedes, that the cross-claim must rise or fall with the complaint. Hewitt's arguments on its motion to dismiss are thus aimed at both the complaint and the cross-claim. Rather than file a memorandum rebutting Hewitt's arguments, the PBGC has joined in the plaintiffs' opposition to Hewitt's motion.

[2] The resolution of the motion on substantive grounds renders it unnecessary for the court to consider the statute of limitations arguments.

[3] Plaintiffs do allege, at paragraph 23 of the complaint, that "[i]nformation regarding the repeated meetings and other

occasions when [Hewitt] . . . exercised defendant's fiduciary duties regarding [the Plan], or could and should have exercised those duties, is particularly within the knowledge of Hewitt." Complaint at para. 23. Plaintiffs apparently believe that they are thus freed from any responsibility to make more specific allegations of misconduct by Hewitt, pending discovery. However, the allegation that Hewitt knows more about what happened in meetings related to its actuarial duties than do the plaintiffs adds nothing. The court will not accept the notion that, because the plaintiffs do not know the specifics of Hewitt's activities, one can assume that those activities give rise to a fiduciary relationship.

[4] Plaintiffs argue that the complaint also alleges that Hewitt acted in collusion with Kaiser. They cite no specific paragraph for this allegation and the court finds it nowhere. The closest allegation would appear to be paragraph 32 where plaintiffs allege that Hewitt either delegated the responsibility for selecting the Plan's actuarial assumptions to Kaiser or allowed Kaiser to do so "in order not to jeopardize its lucrative professional relationship with Kaiser." Cplt. at para. 32. From this allegation one cannot reasonably infer collusion with Kaiser, one can at most infer profit maximizing or perhaps greed on Hewitt's part.

[5] The statutory duties referred to are set out at 29 U.S.C. sections 1023(a)(4)(B); 1023(d)(8), (10) and (13); and 1082(c)(3). The pertinent ERISA regulations, established by the Joint Board for Enrollment of Actuaries pursuant to 29 U.S.C. section 1242, are set out in 29 C.F.R. section 901.2. The I.R.S. regulations at issue are codified at 31 C.F.R. section 10.0 et seq.

[6] On this point, the parties strive mightily against nonexistent targets. The defendant employs the factors of *Cort v. Ash*, 422 U.S. 66 (1975), to argue at length concerning the unavailability under ERISA of a private cause of action for damages against a non-fiduciary. Plaintiffs' belated concession renders that argument unnecessary. More curiously, the plaintiffs also apply *Cort v. Ash* to argue in favor of a cause of action already granted to them by statute.

[7] Since the Plan was terminated long ago, and with it Hewitt's role as plan actuary, obviously injunctive relief is irrelevant.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WILLIAM J. MERTENS, ALEX W. BANDROWSKI, JAMES E. CLARKE and RUSSELL FRANZ,

Plaintiffs,

v.

HEWITT ASSOCIATES, an Illinois Partnership; KAISER STEEL RETIREMENT PLAN; and PENSION BENEFIT GUARANTY CORPORATION, as statutory trustee of the Kaiser Steel Retirement Plan,

Defendants.

No. C-89-4475-MHP

JUDGMENT
Fed.R.Civ.P. 58

This action having come before this court, the Honorable Marilyn Hall Patel, United States District Judge presiding, and the issues having been duly presented and an order having been duly filed herein dismissing all claims,

IT IS ORDERED AND ADJUDGED that plaintiffs' complaint is DISMISSED as to all defendants, the Pension Benefit Guaranty Corporation's cross-claim is DISMISSED and this action is DISMISSED in its entirety.

IT IS SO ORDERED.

Dated: August 9, 1990

/s/
MARILYN HALL PATEL
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM J. MERTENS; ALEX W. BANDROWSKI; JAMES E. CLARKE; RUSSELL FRANZ,

Plaintiffs-Appellants,

v.

HEWITT ASSOCIATES, an Illinois Partnership; KAISER STEEL RETIREMENT PLAN; PENSION BENEFIT GUARANTY CORPORATION, as statutory trustee of the Kaiser Steel Retirement Plan,

Defendants-Appellees.

No. 90-16272

D.C. No. CV-89-4475-MHP

OPINION

Appeal from the United States District Court
for the Northern District of California
Marilyn Hall Patel, District Judge, Presiding

Argued and Submitted
August 14, 1991 - Pasadena, California
Filed November 4, 1991

Before: NORRIS and THOMPSON, Circuit Judges, and KING, District Judge.*
Opinion by Judge Thompson

Plaintiffs, former employees of Kaiser Steel Corporation ("Kaiser") and participants in its ERISA qualified

* Hon. Samuel P. King, Senior United States District Court Judge for the District of Hawaii, sitting by designation.

pension plan, brought this action against the plan's actuary, Hewitt Associates ("Hewitt"), for ERISA-based and pendent state claims. The district court dismissed all of the plaintiffs' claims and entered judgment in favor of Hewitt. We affirm the district court's dismissal of the ERISA-based claims, but reverse its dismissal of the pendent state law claim.

FACTS

On a motion to dismiss, all material allegations in the complaint must be taken as true and construed in the light most favorable to the plaintiff. *Call v. Sumitomo Bank*, 881 F.2d 626, 630 (9th Cir. 1989). With this in mind, we state the following facts as alleged by the plaintiffs and take these facts as true for the purpose of deciding this appeal.

According to the plaintiffs, Kaiser hired Hewitt to perform actuarial work for its ERISA plan. Early in 1980, Kaiser restructured its business operations and virtually eliminated its steel-making operations. As a result, the number of employees retiring from the company who were entitled to early retirement benefits under the plan increased significantly, as did the plan's funding costs.

The actuarial assumptions Hewitt had developed previously for the plan did not reflect the increased costs, and Hewitt did not change its assumptions to reflect the increase. Rather, Hewitt delegated the responsibility for selecting actuarial assumptions to Kaiser.

According to the plaintiffs, Hewitt's conduct was improper. Had Hewitt employed proper actuarial

assumptions, Kaiser would have had to make substantially higher contributions to the plan. Hewitt failed to disclose this funding inadequacy in any certificate or other writing which it prepared on behalf of the plan. As a consequence of Hewitt's acts and omissions, Kaiser failed to fund the plan adequately, and the plan's assets became insufficient to satisfy benefit commitments, including the commitment to pay the plaintiffs their fully vested pensions.

The plaintiffs further alleged that at the same time Hewitt was performing services for the plan, it was also providing actuarial services to Kaiser. Hewitt did not want to jeopardize this lucrative professional relationship. Hewitt failed to disclose to plan administrators its relationship with Kaiser and the potential conflict that the relationship created.

In October 1986,[1] the Pension Benefit Guaranty Corporation ("PBGC") determined that the plan was underfunded and incapable of paying its liabilities, including the pension benefits owed to the plaintiffs. As a result of the underfunding, the PBGC terminated the plan and began paying the plaintiffs and other plan participants substantially reduced benefits. For example, one plaintiff's monthly check was reduced from $2,016 to $521. Other plaintiffs suffered comparable reductions.

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[1] The appellants' opening brief stated that the 1986 date in the complaint is incorrect, and that the PBGC actually terminated the plan in February 1987. The resolution of this question is irrelevant to the outcome of this appeal. *See infra* note 10.

The plaintiffs' complaint alleged three causes of action: a cause of action based on ERISA for "breach of professional duties to the plan;" a cause of action based on ERISA for "unlawful party-in-interest transactions;" and a professional malpractice claim under California law. The PBGC answered and filed a cross-claim in which it asserted that any recovery by the plaintiffs should be paid to it.

Hewitt filed a motion to dismiss the plaintiffs' complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). It argued that the entire complaint was barred by the statute of limitations and also that the ERISA claims were insufficient as a matter of law.

In their response to the motion, the plaintiffs asserted that their first claim actually stated three independent claims under ERISA: a claim for breach of fiduciary duty; a claim for knowing participation in a breach of fiduciary duty; and a claim for non-fiduciary breach of actuarial duties. They stood by their remaining claims.

In its order granting the motion to dismiss, the district court determined that the ERISA claims were insufficient as a matter of law. The court also held that the pendent state claim was barred by the applicable California limitation period. It dismissed the PBGC's claim as derivative. The plaintiffs did not seek leave to amend their complaint, and this appeal followed.[2]

[2] The plaintiffs have not appealed dismissal of their ERISA claim for "unlawful party-in-interest transactions."

DISCUSSION

A. *Claim for Breach of Fiduciary Duty*

An ERISA fiduciary includes anyone who exercises discretionary authority over the plan's management, anyone who exercises authority over the management of its assets, and anyone having discretionary authority or responsibility in the plan's administration. 29 U.S.C. § 1002(21)(A);[3] *Credit Managers Ass'n v. Kennesaw Life & Accident Ins. Co.*, 809 F.2d 617, 625 (9th Cir. 1987). A party "rendering professional services to a plan is not a fiduciary so long as he does not exercise any authority over the plan 'in a manner other than by usual professional functions.'" *Nieto v. Ecker*, 845 F.2d 868, 870 (9th Cir. 1988), quoting *Yeseta v. Baima*, 837 F.2d 380, 385 (9th Cir. 1988).

The district court held that the complaint failed to state a claim for breach of fiduciary duty because nothing in the complaint indicated that Hewitt had done anything other than render actuarial services to the plan. Further,

[3] 29 U.S.C. § 1002(21)(A) provides in relevant part:

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

nothing in the complaint indicated that Hewitt exercised control or authority over plan assets. Although the plaintiffs allege that Hewitt acted negligently, fraudulently, and reprehensibly as an actuary, no inference can be made from the complaint that Hewitt acted in any capacity other than as an actuary.

Although the courts have recognized the possibility that professional service providers can be liable as ERISA fiduciaries, they consistently have found attempts to assert liability on that basis unavailing. For example, the *Nieto* court affirmed the district court's dismissal of a claim against an attorney who allegedly rendered services to an ERISA plan in an improper and fraudulent manner. Because the complaint did not allege that the attorney had authority over plan assets, the court rejected the argument that he was an ERISA fiduciary, even though his dishonesty may have led to the dissipation of plan assets. 845 F.2d at 870-71; *see also Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 535-38 (7th Cir. 1991) (actuary was not fiduciary where there was no allegation that it had "actual decision-making power"); *Yeseta v. Baima*, 837 F.2d 380, 384-85 (9th Cir. 1988) (attorney and accountant who did not exercise actual control over management of plan not fiduciaries); 29 C.F.R. § 2509, 75-5 (1990) (actuary not fiduciary solely by virtue of rendering services to plan).

In their brief, the plaintiffs rely primarily on *Monson v. Century Mfg. Co.*, 739 F.2d 1293, 1303 (8th Cir. 1984). In *Monson*, the court upheld a district court's finding of liability for breach of fiduciary duties against the general manager of a plan sponsor. The district court noted that the manager had worked on relevant amendments to the

plan, had consulted on the plan's behalf with independent experts regarding plan investments, had authority to issue press releases on behalf of the plan, and was responsible for informing employees about the plan. *Id.*

Monson is easily distinguishable from this case. Unlike the general manager in *Monson*, Hewitt was an independent actuary, not part of the plan sponsor's control group. Also, unlike the facts in *Monson*, the plaintiffs' allegations do not indicate that Hewitt had any control over the plan's operation or administration.

We conclude the district court correctly held that the plaintiffs' allegations failed to state a claim for breach of fiduciary duty under ERISA.

B. Claim for Knowing Participation in Breach of Fiduciary Duty

The plaintiffs argue that even if Hewitt is not a fiduciary, it still may be liable under ERISA if it knowingly participated in another's breach of fiduciary duty.

ERISA provides that any person who is a fiduciary to a plan who breaches any duty imposed by the statute is personally liable to the plan. 29 U.S.C. § 1109(a).[4] ERISA's

[4] Section 1109(a) provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of

civil enforcement section provides that a civil action may be brought by the Secretary or by a plan participant, beneficiary, or fiduciary for relief under section 1109. 29 U.S.C. § 1132(a)(2).[5]

In *Nieto*, we held that the plain language of section 1109(a) "limits its coverage to fiduciaries, and nothing in the statute provides any support for holding others liable under that section." 845 F.2d at 871. We rejected the argument that a non-fiduciary could be liable under this section for knowing participation in a breach of fiduciary duty. *Id.*[6]

Plaintiffs contend that we can and should overrule *Nieto* because Congress' enactment of the Omnibus Revenue Reconciliation Act of 1989 and its addition of a new enforcement provision to ERISA, 29 U.S.C. § 1132(l),[7]

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assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

[5] Section 1132 provides in relevant part:

(a) A civil action may be brought –

. . .

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title . . .

[6] We subsequently followed *Nieto* in *Call v. Sumitomo Bank*, 881 F.2d at 634-35.

[7] Section 1132(l) provides in relevant part:

(l) In the case of –

(A) any breach of fiduciary responsibility . . . or

(B) any knowing participation in such a breach or violation by any other person, the Secretary shall assess a civil

clarified Congress' intent to permit suits for knowing participation in a breach of fiduciary duty. Section 1132(l) gives the Secretary of Labor the power to assess a civil penalty against fiduciaries or other persons in certain amounts based upon any "knowing participation" in such a breach of fiduciary duty. The plaintiffs note that section 1132(l) refers to judicial proceedings brought by the Secretary under sections 1132(a)(2) or (a)(5). Section 1132(a)(2) in turn allows both the Secretary and plan participants to bring civil actions. The plaintiffs therefore conclude that because Congress in section 1132(l) gave the Secretary the ability to bring an action against non-fiduciary assistants under 1132(a)(2), it implicitly gave plan participants the same ability.

We reject this argument. The plain language of section 1132(l) applies to the Secretary only, not to plan participants. "[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1984), quoting *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11, 19 (1979); *see also Nieto*, 845 F.2d at 872.

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penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (l), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach . . .

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

In drafting the ERISA amendments in 1989, Congress considered but rejected an amendment to overrule our decision in *Nieto*. H.R. Rep. No. 101-247, 101st Cong., 1st Sess. 77-78, *reprinted in* 1989 U.S. Code Cong. & Admin. News 1906, 1969-70. We decline to do what Congress has refused to do.

C. Claim for Non-Fiduciary Violations of ERISA

The plaintiffs also argue that their first cause of action states a claim under 29 U.S.C. § 1132(a)(3), which provides that plan participants may seek equitable relief to redress violations of ERISA.[8] By this claim, the plaintiffs sought a recovery of money from Hewitt for its alleged improper acts.

The only way the district court could fashion an equitable remedy under ERISA to provide a monetary recovery for the plaintiffs against Hewitt would be to order restitution. The district court dismissed this claim, however, because the plaintiffs had not alleged that Hewitt received anything other than its compensation for actuarial services. We agree with this analysis. Restitution was not available because unjust enrichment to support the plaintiffs' claim was not alleged.

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[8] Section 1132(a)(3) provides in relevant part:
A civil action may be brought –
. . .
(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

Moreover, restitution requires that there be a direct link between the loss complained of and the recovery sought. *See Scanwell Laboratories, Inc. v. Thomas*, 521 F.2d 941, 949-50 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 910 (1976) (to make out a claim for restitution "it is usually necessary for the plaintiff to show that he conferred the benefit"). Here, no such link exists. The plaintiffs allege that Hewitt was paid by Kaiser, not from assets of the plan. It is not possible, therefore, to frame a claim for restitution in terms of the recovery of plan assets wrongfully obtained by Hewitt. *See United States ex rel. Youngstown Welding and Eng'g Co. v. Travelers Indem. Co.*, 802 F.2d 1164, 1169 (9th Cir. 1986) (party who is not source of unjust enrichment is not entitled to restitution under Arizona law).

The plaintiffs argue that to the extent Kaiser was paying Hewitt, it was doing so as remuneration for breach of Hewitt's statutory duty and that all payments received by Hewitt were thus "unjust enrichment." The plaintiffs, however, have provided no authority that supports this theory. Moreover, to accept the plaintiffs' argument would be to obliterate the already blurry distinction between restitution and damages at law. Given that ERISA explicitly limits claims pursuant to subsection (a)(3) to claims for equitable relief, such an expansion would appear contrary to the spirit of the statute. *See Nieto*, 845 F.2d at 873 (permitting recovery of damages under subsection (a)(3) would render subsection (a)(2) superfluous, "a result contrary to a fundamental cannon of statutory construction").[9]

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[9] Even under this somewhat circuitous theory of unjust enrichment, the plaintiffs failed to allege Hewitt obtained anything from the plan.

We conclude that the district court did not err in dismissing the plaintiffs' non-fiduciary ERISA claim for restitution.

D. Pendent California Professional Malpractice Claim

The district court dismissed the plaintiffs' pendent professional negligence claim as time barred. The parties agree that California Code of Civil Procedure § 339(1), the two-year statute of limitations for professional malpractice claims, governs this pendent claim. The dispute is over when the claim accrued.

In California, the statute of limitations for a professional malpractice claim begins to run upon the occurrence of the last fact essential to the cause of action. "The harshness of this rule has been ameliorated in some cases where it is manifestly unjust to deprive the plaintiffs of a cause of action before they are aware that they have been injured." *Leaf v. City of San Mateo*, 104 Cal.App.3d 398, 406, 163 Cal.Rptr. 711, 715 (1980). This is generally known as the "discovery rule."

Where the "discovery rule" applies, "the accrual date of a cause of action is delayed until the plaintiff is aware of her injury and its negligent cause. A plaintiff is held to her actual knowledge as well as knowledge that could reasonably be discovered through investigation of sources open to her." *Jolly v. Eli Lilly & Co.*, 44 Cal.3d 1103, 1109, 245 Cal.Rptr. 568, 661 (1988) (citation and footnote omitted). California courts have applied the discovery rule to professional malpractice cases. *See Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal.3d 176, 98

Cal.Rptr. 837 (1971) (attorney malpractice); *Moonie v. Lynch*, 256 Cal.App.2d 361, 64 Cal.Rptr. 55 (1967) (accountant malpractice).

Hewitt does not contest that the discovery rule applies here. Rather it argues that the plaintiffs should have discovered Hewitt's alleged wrongs in 1986, when the plan failed.[10] It argues that the plaintiffs had access to plan reports that would have alerted them to any actuarial improprieties. It asserts that certainly when the plan failed, the plaintiffs were on notice and should have obtained the reports that would have alerted them to the funding problems.

Hewitt's argument fails under California law. "[T]he question of when there has been a belated discovery of the cause of action, especially in malpractice cases, is essentially a question of fact . . . [and] [i]t is only where reasonable minds can draw but one conclusion from the evidence that the question becomes a matter of law." *Brown v. Bleiberg*, 32 Cal.3d 426, 436, 186 Cal.Rptr. 228, 233 (1982).

In *Baright v. Willis*, 151 Cal.App.3d 303, 198 Cal.Rptr. 510 (1984), the court refused to sustain a demurrer in a

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[10] The plaintiffs' complaint alleged that "[i]n October, 1986, the PBGC determined the PLAN to be severely underfunded and incapable of paying its liabilities, including the full early retirement monthly pension benefits owed to the plaintiffs and other similarly situated PLAN participants and beneficiaries."

Even if, as the plaintiffs now claim, the PBGC made the determination in February 1987, the result is the same – the complaint was not filed until December 1989, two years and nine months after the later date.

professional negligence case where the plaintiff's complaint did not show on its face that "in the exercise of due diligence plaintiff should have earlier discovered respondent's alleged negligence and failed to do so." 151 Cal.App.3d at 311, 191 Cal.Rptr. at 514-15. A demurrer on statute of limitations grounds is improper "where the complaint merely shows that the action may have been barred. It must appear affirmatively that, upon the facts stated, the right of action is necessarily barred." 151 Cal.App.3d, at 311, 191 Cal.Rptr. at 514, quoting *Vassere v. Joerger*, 10 Cal.2d 689, 693, 76 P.2d 656, 653 [*sic*] (1938).

In the present case, the complaint does not show on its face that the plaintiffs should have discovered Hewitt's alleged negligence when the PBGC determined the plan to be severely underfunded and incapable of paying its liabilities. The PBGC may terminate a plan for a variety of reasons not premised on wrongdoing by either the plan fiduciaries or the plan's enrolled actuary. *See* 29 U.S.C. § 1342(a). *See also Pension Benefit Guaranty Corp. v. LTV Corp.*, ___ U.S. ___, 110 S.Ct. 2668, 2672-73 (1990) (plan sponsor entering bankruptcy). Reasonable minds can draw more than one conclusion from the circumstance of underfunding.

Thus, we reverse the district court's dismissal of the pendent state claim as barred by the applicable statute of limitations. The complaint does not show on its face that the plaintiffs were placed on a discovery inquiry as to Hewitt's alleged professional malpractice more than two years before the complaint was filed. On remand, the district court has discretion to allow the plaintiffs to

pursue the pendent claim or to dismiss it. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

CONCLUSION

The district court's dismissal of the ERISA-based claims is affirmed. The district court's dismissal of the pendent state claim is reversed and remanded.

AFFIRMED in part, **REVERSED** in part and **REMANDED.**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM J. MERTENS; ALEX W. BANDROWSKI; JAMES E. CLARKE; RUSSELL FRANZ,

Plaintiffs-Appellants,

v.

HEWITT ASSOCIATES, an Illinois Partnership; KAISER STEEL RETIREMENT PLAN; PENSION BENEFIT GUARANTY CORPORATION, as statutory trustee of the Kaiser Steel Retirement Plan,

Defendants-Appellees.

No. 90-16272

D.C. No. C-89-4475-MHP

ORDER

Before: NORRIS and THOMPSON, Circuit Judges, and KING, District Judge.*

The Secretary of Labor's Motion for Leave to File its Brief Amicus Curiae is granted. The brief, received by the clerk on November 18, 1991, is ordered filed.

* Hon. Samuel P. King, Senior United States District Court Judge for the District of Hawaii, sitting by designation.

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ORDER

Before: NORRIS and THOMPSON, Circuit Judges, and KING, District Judge.*

The panel, as constituted above, has unanimously voted to deny the petition for rehearing. Judges Norris and Thompson have voted to reject the suggestion for rehearing en banc, and Judge King has so recommended.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P.35 (b).

* Hon. Samuel P. King, Senior United States District Court Judge for the District of Hawaii, sitting by designation.

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.